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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GUSTAV MAROKITY, Defendant and Appellant.	B213631 (Los Angeles County Super. Ct. No. LA053936)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathryne Ann Stoltz, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson, Lawrence M. Daniels, Joseph P. Lee and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Gustav Marokity appeals from the judgment entered upon his convictions by jury of two counts of committing a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1] The trial court sentenced him to prison for the upper term of eight years on count 1 and to a consecutive one-third of the midterm, or two years, on count 2. Appellant contends that (1) the trial court erred in failing to instruct the jury sua sponte on assault and/or battery as lesser included offenses of section 288 subdivision (a), (2) the trial court erred in allowing admission of evidence that appellant possessed pornographic videotapes, including some containing underage girls, (3) he suffered ineffective assistance of counsel due to his attorney's failure to request a limiting jury instruction with respect to the pornographic videotapes evidence, (4) he suffered ineffective assistance of counsel due to his attorney's failure to raise meritorious hearsay and confrontation clause objections to extrajudicial statements of the nontestifying minor victim, (5) the trial court erred in failing to exclude those extrajudicial statements, (6) the trial court erred in failing to appoint separate counsel to represent appellant to determine whether there were grounds for filing a motion for new trial on the basis of ineffective assistance of counsel, (7) reversal is required as a result of the aforementioned cumulative errors, (8) the matter must be remanded for resentencing because application of *People v. Sandoval*[2]or the post *Cunningham*[3] legislation to appellant's sentencing constituted an ex post facto violation or improper judicial enlargement of punishment that violates the California and United States Constitutions, and (9) the matter must be remanded for resentencing because the trial court abused its discretion in imposing an upper term sentence on count 1.

We affirm.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*).

3 *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).

FACTUAL BACKGROUND

Prosecution evidence

Background

In 2000, appellant married Mar., a Ukrainian pediatrician, in Hungary, where he met her. At the time, appellant was visiting Hungary, his birthplace. He had been a United States resident since 1983 and had become a United States citizen. After their marriage, Mar. moved to the United States and lived in appellant's home in Van Nuys. In 2001, their son, A., was born and, in 2002, their daughter, K. was born.

Sexual abuse

According to Mar. appellant was very affectionate with his children. When A. was naked, appellant kissed and smelled A.'s stomach, thighs, genitalia, buttocks and the area between A.'s genitals and thighs, several times a day. When K. was born, appellant did the same to her. When he engaged in this behavior, Mar. claimed that appellant appeared to be very excited and "not really there." She told him that his conduct was inappropriate and could result in his going to jail. Appellant called her "crazy" and said, "I just love my child."

The couple often argued about appellant's behavior, and the police were called on a couple of occasions. On one such occasion, in February 2003, Mar. called the police. Responding officers gave her a child abuse hotline number, which she called. The Los Angeles County Department of Children and Family Services (DCFS) sent a social worker to the residence. At the social worker's suggestion, Mar. and the children moved out.

During the separation, appellant initially had monitored visitation with his children. He later obtained unmonitored visitation and shared custody. While the Children's Court proceedings were ongoing, Mar. met a police officer with the Redondo Beach Police Department. In 2004, she moved to reside with him.

After appellant's unmonitored visitation began, Mar. noticed that A. began displaying anxiety and anger, he and K. were having nightmares, and both children exhibited "sexualized behavior." A. would kiss K. on her lower stomach, close to her

genital area, and K. would lick A. and Mar.'s boyfriend's hand and arm and lie on A. As a result, Mar. wanted to start the children in therapy, but appellant refused to consent.

On May 25, 2005, during preschool nap time, A. pulled down his pants and rubbed his penis "back and forth" with his hands until he was stopped by the teacher. A. had never done anything like that at school before. When questioned, he said he learned it from "my dad." He also said that "my dad touches [K.'s] private parts" or "cucu." When the teacher gave A. a doll to demonstrate, he pointed to its genital area and said, "[appellant] touched my penis and my sister's cucu [vagina] like this[.]" The incident was reported to Mar. and the police.

Interviews of the children

Mar. picked up the children from preschool and took them to Harbor UCLA Medical Center, where they were examined and interviewed by Dr. Martin Talamo, a medical doctor. A. told him that appellant touched A.'s penis, inserted his pinky finger into A.'s anus, and that there was "poo poo" on appellant's finger. A. reported rectal discomfort or pain. Dr. Talamo diagnosed A. with Phimosis, a condition in which the foreskin on an uncircumcised penis cannot be fully retracted from the penis head, sometimes leading to infections. A person with Phimosis must clean his penis by moving the foreskin back and forth, which can cause discomfort. While pointing to her vagina, K. told Dr. Talamo that her father had touched her "cucu" and that she saw her father touch A. Dr. Talamo's examination could neither confirm nor negate sexual abuse. He recommended that the children have a detailed, follow-up sexual-abuse examination.

On May 31, 2005, Mar. took the children to Sandra Elvik, a pediatric nurse practitioner, for the sexual-abuse examination. During the examination, A. stated, "Don't touch my peanuts," referring to his penis, and, "Don't hurt my peanuts like my dad does." When asked how appellant hurts his penis, A. demonstrated by taking the loose foreskin of his uncircumcised penis and vigorously shaking it back and forth. A. complained about pain in his anal area and said that his father stuck his finger in his anus and had "poop" on it. Elvik examined A. with a colposcope and saw a fissure near his anus. At the top of the fissure was a red one-quarter-inch abrasion. The findings could have been

caused by sexual abuse or by many other things. K. told Elvik that appellant had stuck his thumb into her genital area. A colposcope examination of K.'s anus area was normal. Her examination could neither confirm nor negate sexual abuse.

Los Angeles Police Department Detective Katherine Gosser began an investigation. On September 27, 2005, she and Deputy District Attorney Hilleri Merritt interviewed the children. A. repeated his claims that his father inserted his pinky finger in A.'s anus, and, touched his "peanuts" numerous times. A. said that he saw his father insert his little finger in K.'s "cucu." K. spread her legs, touched her thumb to her groin area and demonstrated how appellant put his finger in her "cucu."

On November 8, 2007, Detective Gosser reinterviewed A. to see if he still remembered the incidents in the event he had to testify. A. repeated what he had previously reported appellant had done to him. He also said that he saw appellant enter K.'s room while she was asleep, leaving the door slightly open. A. peeked and saw appellant putting his finger in K.'s anus or vagina.[4] He expressed reluctance to testify and asked, "What if I lied?" When asked if he had lied about anything, he first said, "Just about the finger," and expressed concern about being responsible for putting his father in jail. After the detective told A. he was not responsible and to just tell the truth, A. said he had not lied, and the story about the finger was true.

A.'s trial testimony

At trial, A. recanted most of his pretrial statements. He testified that appellant never touched his penis or any part of his body in a way he did not like. Appellant never did anything to his anus, and A. did not recall telling anyone otherwise. He never saw appellant do anything to his sister and never told anyone that he did. A. did not recall testifying at appellant's preliminary hearing that appellant played with A.'s penis,

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[4] Detective Gosser was present at the preliminary hearing on April 20, 2006 and heard A. testify that appellant placed his finger in A.'s anus and inserted his finger in his sister's "cucu," referring to her vaginal or anal area.

inserted his finger in A.'s anus, inserted his finger in K.'s "cucu," that K. said that it hurt, and that K. screamed.

Appellant's interview and search of his prison cell

In September and November 2005, Detective Gosser interviewed appellant. The first time, appellant went to the police station on his own, with videotapes he had made to show in Children's Court that he was a good father. Appellant said that A. would frequently grab, touch or play with his own penis, and appellant would tell him to stop. One of the videotapes showed this. Appellant admitted being very affectionate with his children and kissing them on their thighs and buttocks. He said that that was acceptable in Hungary. He denied having any sexual intent when doing so. He said that he might have touched inside his daughter's vagina as he cleaned her and explained that he got K.'s "poop" on him when she defecated on herself, and he had to give her a bath.

On July 18, 2008, during a routine search of appellant's jail cell, an officer found an envelope containing contraband photographs of a "little boy" touching his penis and a "little girl" touching her chest. Appellant told jail officials that the photographs were of his children expressing normal childhood behaviors and that the photographs were evidence in this case.

Appellant's Children's Court testimony

Portions of appellant's testimony in Children's Court were introduced into evidence. He testified there that he was advised by social workers that he could not kiss his children on or near their genitals. He believed he could kiss them anywhere else. He kissed them on their stomachs, thighs and buttocks after bathing or changing them. He did not remember if he kissed them on their genitals. He denied touching his children inappropriately, masturbating them, inserting his finger in their rectums, and inserting his finger in K.'s vagina, though he possibly did so while cleaning her.

Appellant further testified in Children's Court that Mar. expressed concern with his kissing A.'s genital area, said he was abusing their children, and told him not to kiss their bodies. He "slow[ed] down as much as [he could], but admit[ed], [he] couldn't stop it hundred percent." He videotaped the children bathing naked while they were in his

custody. He also testified that he had 30 "adult tapes" and at least 10 "soft core" pornography tapes. Some of the videotapes depicted girls that looked like young children.[5] He sent an e-mail to the movie association complaining about it.

Expert testimony

Dr. Toni Johnson, a licensed clinical psychologist, testified as the People's expert on sexual abuse of prepubescent children. He believed that A.'s public masturbation at preschool was unusual because most children masturbate in private. While more children who engage in public masturbation have been sexually abused, there is not always a causal connection between sexual abuse and sexual behavior, even in small children. While most anxious children misbehave, some masturbate or touch themselves to deal with the stress. Divorce and custody battles can cause anxiety and stress in children. A child might also masturbate in public simply because of poor impulse control.

Dr. Johnson also testified that repetitious interviews, repeating the same question, using leading questions, the child's age (the younger the more suggestible), whether the interviewer is an authority figure, the interviewer's bias, and whether the child is accompanied by a parent when the questions are being asked, can all affect the suggestibility of a child.

The defense's evidence

Appellant called several witnesses who testified to his loving and appropriate relationship with his children. Marta Scilascsiky, a child care provider who monitored his visits with the children, so testified. Robert Petit similarly testified. He became friends with appellant because their sons attended the same daycare. Petit said that appellant was a good dad and had a "perfectly good, loving" relationship with A. He saw appellant kissing his children's stomachs and giving them raspberries, which made them laugh. He never saw appellant touching them inappropriately. On occasion, Petit even

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[5] Mar. found dozens of pornographic videotapes in appellant's possession. One videotape was a slide show of photographs of "naked little girls," who appeared to her to be no more than 10 years old.

left his son in appellant's care. Petit saw A. pull his penis a few times and heard appellant tell him to stop.

Dr. Lydia Hernandez, a clinical psychologist to whom the children were referred in 2005 by the DCFS, believed that A. was unable to tell the difference between the truth and a lie based upon his answers to her questions and his failure on four picture tasks designed to assist in making that determination. She attributed this to A.'s age, limited language skills, and the emotionally overwhelming conflict between his parents. She was also unable to determine from that test if K. knew the difference between the truth and a lie. She opined that it was unclear whether the children had been sexually abused by appellant. They gave her conflicting answers. A. first told her that appellant hurt his anus and then immediately said, "No. No one has hurt me." K. told Dr. Hernandez that someone touched her on the "cucu" and it hurt, but then said that it did not. Dr. Hernandez noted that repeated interviewing, to which the children had been subjected, impacted the validity of her results. The children's aggressiveness could be explained by numerous factors, including domestic violence and custody issues, as well as to sexual abuse.

Dr. Barry Hirsch, a forensic psychologist, testified that younger children are highly suggestible to abuse charges. Repeated questions, multiple interviews, the authority figure of the questioner, all increase suggestibility. Neither public masturbation, by itself, nor anger and aggression are necessarily signs that a four-year-old boy has been sexually abused.

Appellant testified on his own behalf. He loved his children very much and was very affectionate with them. He denied kissing K. near her genitals and A. on his genitals, though he "possibly" kissed A. near his genitals. Appellant denied inserting his finger in A.'s anus or his thumb in K.'s vagina. As his house did not have a bedroom door, A. could not have seen appellant inserting his finger in K.'s vagina through the door. But such an act may have occurred as often as once a week, when appellant was cleaning K.'s dirty diapers. Because appellant knew of A.'s Phimosis, he never masturbated A., as he felt uncomfortable doing so, never kissed A. on the penis, and

never touched A.'s penis, unless it was done to help him urinate. Appellant often told A. to stop masturbating. He never touched or kissed either of his children for sexual gratification and saw nothing inappropriate in the way he kissed his children.

Appellant had pornographic videotapes at his home, but none of them portrayed children. His children never saw them. He refused Mar.'s request for therapy for the children because they were happy during his visits. Mar. threatened appellant that he should have only one visitation every two weeks with his children, and, if he did not agree, he would "see" what she was going to do. Appellant became more concerned about her threats when she began her relationship with her boyfriend. Appellant videotaped his children all of the time because he loved them. He also did so to document his time with them. The videotapes included A. rubbing and pulling his penis in order to show that A. did this on his own, and had been doing so since birth.

DISCUSSION

I. Failure to instruct on lesser included offenses sua sponte

A. Contention

Appellant was convicted of two counts of committing a lewd act on a child under the age of 14. He contends that the trial court erred in failing to instruct the jury sua sponte on the lesser included offenses of assault and/or battery and, that to the extent the failure to so instruct may be attributed to his attorney, he suffered ineffective assistance of counsel. Appellant argues that there was substantial evidence "from which the jury could reasonably conclude [appellant's] touching and/or kissing of his children was offensive, inappropriate, and unwarranted, but that it was not sexually motivated," justifying the instruction on the lesser offenses. This contention is without merit.

B. Instructional requirements

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 quoting

People v. St. Martin (1970) 1 Cal.3d 524, 531.) This obligation has been held to include giving instructions sua sponte on lesser included offenses when the evidence raises a question whether all of the elements of the charged offense are present. (*People v. Breverman, supra,* at p. 154.) A trial court must instruct sua sponte on a lesser included offense supported by the evidence even if it is inconsistent with the defendant's theory of the case. (*Id*. at p. 159.)

A lesser offense is necessarily included in the charged offense only if it meets either the "'elements test'" or the "'accusatory pleading test.'" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The "elements test" is satisfied when all of the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense. (*Ibid*.) The "accusatory pleading test" is satisfied """if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed."""" (*Id.* at pp. 288–289.) A greater offense cannot be committed without committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) "When, as here, the accusatory pleading describes a crime in the statutory language, an offense is necessarily included in the greater offense when the greater offense cannot be committed without necessarily committing the lesser offense." (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) We conclude that neither assault nor battery are lesser included offenses of section 288, subdivision (a), under either test.

Section 288, subdivision (a) punishes "[a]ny person who willfully and lewdly commits any lewd or lascivious act, . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." A violation of section 288, subdivision (a), requires a touching of the victim. (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) The touching can involve any part of the victim's body or clothing, need not be sexual in character, and can be innocent. (*Id.* at pp. 444, 447; see, i.e., *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380 [babysitter rubbed the victim's lower back, stomach and thigh].) The harmfulness of a violation of section 288,

subdivision (a) derives from the intent for sexual gratification, not the nature of the touching, though the nature of the touching might be relevant to the perpetrator's intent. (*People v. Martinez, supra,* at p. 444 ["[T]he 'gist' of [section 288, subdivision (a)] has always been the defendant's intent to sexually exploit a child, not the nature of the offending act"].)

Battery is any "willful and unlawful use of force or violence upon the person of another." (§ 242.) Any "'harmful or offensive touching'" satisfies the element of "'unlawful use of force or violence.'" (*People v. Pinholster* (1992) 1 Cal.4th 865, 961.) The thrust of the battery offense is the touching. No specific intent is required. An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," (§ 240), i.e., an attempted battery (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 460).

Where the touching is innocent, a lewd act can be committed on a child without committing a battery. For example, a person placing a hand on the middle of the thigh of a 10-year-old girl with her consent is not, by itself, offensive or injurious. But if the perpetrator harbors the intent to sexually gratify himself or his victim by that conduct, a violation of section 288, subdivision (a) is established, though the victim may never even know of, or understand, the perpetrator's undisclosed intent. Further, the consent given to the perpetrator precludes a conviction for battery, which is an unconsented to touching. Additionally, a violation of section 288, subdivision (a) can be established where a child touches the perpetrator, while battery requires the perpetrator to do the touching. We therefore hold that battery and assault, an attempted battery, are not lesser included offenses of section 288, subdivision (a). (See *People v. Santos* (1990) 222 Cal.App.3d 723, 739 [stating that battery is not lesser included offense of commission of a lewd act on a child].[6])

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6 As appellant points out, the statement in *People v. Santos* was unexplained and was not germane to the issues before the Court of Appeal in that case.

In *People v. Thomas* (2007) 146 Cal.App.4th 1278, 1291–1293 (*Thomas*), relied upon by appellant, the First District Court of Appeal held that battery is a lesser included offense of section 288, subdivision (a). But the argument before the Court of Appeal in *Thomas* was different than that presented to us. There, the prosecutor argued that a battery is not a lesser included offense of commission of a lewd act on a child because the former requires a touching, whereas the latter does not. In rejecting this argument, the Court of Appeal concluded that both sections 288, subdivision (a) and 242 require touching, although that touching can be constructive. It was not confronted with the argument before us; that battery requires an offensive touching while commission of a lewd act on a child does not require that the touching be offensive to the child. Moreover, in *Thomas*, the People did "not dispute that any lewd act within the meaning of section 288 is necessarily a harmful or offensive touching." (*Thomas, supra,* at p. 1292, fn. 8.) The People make no such concession here.

C. Ineffective assistance of counsel

We also conclude that defense counsel's failure to request instruction on assault and/or battery did not constitute ineffective assistance of counsel. The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland v. Washington, supra,* at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was

asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

The record does not reveal why appellant's counsel did not request instructions on assault and/or battery, nor does it indicate that counsel was asked for an explanation and failed to provide one. It may well be that defense counsel did not want those instructions, believing that without them the jury was unlikely to convict appellant of the more serious charges against him, but with them might have convicted him of the less serious charges. Nor is it reasonably probable that had defense counsel requested the instructions the verdict would have been more favorable to appellant. (*People v. Hernandez, supra,* 33 Cal.4th at pp. 1052–1053.) Because we conclude that assault and battery are not lesser included offenses of section 288, subdivision (a), had counsel requested an instruction on those offenses, the trial court was not obligated to give them. Moreover, those offenses are lesser related offenses to the offense of section 288, subdivision (a) (*People v. Santos*, *supra,* 222 Cal.App.3d at p. 739; *People v. Harlan* (1990) 222 Cal.App.3d 439, 450), and thus the trial court could not have so instructed without the prosecutor's agreement, which was not likely (*People v. Birks*, *supra,* 19 Cal.4th 108).

II. Admissibility of evidence of pornographic videotapes

A. Background

Before trial, defense counsel objected to the prosecutor introducing evidence that appellant had pornographic videotape recordings. Defense counsel did not state the nature of his objections. The prosecutor responded that the only videotapes she would be asking about were the ones depicting young girls who looked like children. She argued that they were relevant to whether appellant touched his children for sexual gratification. The trial court ruled that the evidence was relevant to appellant's intent and that its relevance outweighed any prejudice under Evidence Code section 352.

During trial, the prosecutor introduced evidence that appellant possessed adult and child pornography. She presented appellant's testimony from the Children's Court proceedings that he had 30 "adult tapes," at least 10 "soft core" tapes, and some of the tapes depicted "girls that looked like young children." He testified in those proceedings

that he sent an e-mail to a movie association complaining that the videos depicted young girls. Mar. testified that appellant had "dozens of videotapes of pornographic movies," at least one of which had a slide show of photographs of naked "little girls" who appeared to be no more than 10 years old. When she confronted appellant, he said that they belonged to a friend who used to live with him. The prosecutor also introduced appellant's statements to Detective Gosser that appellant obtained the videotapes of the young girls from a friend who recorded them from Web TV. According to the detective, appellant said nothing about getting them by mistake or e-mailing a complaint to a movie association. Appellant did not object to the admission of any of the foregoing mentioned testimony.[7]

When appellant testified at trial, he admitted that he had pornography at home, but denied having child pornography. He also denied making the statements about videotapes to Detective Gosser.

B. Contentions

Appellant contends that the trial court erred in admitting evidence that he possessed adult and child pornographic videotapes. He argues that evidence of his possession of adult pornography was irrelevant to his intent to touch his two and four-year-old children, was outweighed by its prejudice under Evidence Code section 352, and rendered his trial fundamentally unfair, thereby depriving him of due process. He argues that evidence of the child pornography was inadmissible because it constituted other crimes evidence and was not sufficiently similar to the charged crime to be relevant. Videotapes of adolescent girls are dissimilar to sexually molesting toddlers and young children. He further argues that any relevance is outweighed by its prejudice under Evidence Code section 352.

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[7] The trial court sustained its own objections to the relevance of Mar.'s testimony that "[appellant] had a lot of another [*sic*] pornographic movies, which involved mostly sadomasochistic videos." Defense counsel then moved to strike her answer, which the trial court granted, admonishing the jury to disregard it.

Respondent argues that appellant has forfeited these claims by failing to object in the trial court on the grounds of relevance, Evidence Code section 352 or fundamental fairness (due process).

C. Forfeiture

Appellant forfeited objections to the evidence that he possessed adult pornography, but not to the evidence he possessed child pornography. Evidence of appellant's possession of the adult material was not the subject of the in limine discussion, as the prosecutor stated her desire only to admit evidence of the alleged child videotapes. When evidence of the adult videotapes was presented, appellant made no objection to it. Consequently, he failed to preserve any claims that the adult pornography was improperly admitted in evidence. (See *People v. Derello* (1989) 211 Cal.App.3d 414, 427–428 [prerequisite to raising issue on appeal is objection in the trial court].)

Objection to the admission in evidence of the child pornographic videotapes stands on a different footing. The purpose of the forfeiture rule is to encourage counsel to object and thereby give the trial court an opportunity to consider the objection. (*People v. Tuggles* (2009) 178 Cal.App.4th 1106, 1123.) The defense objected during the in limine discussion, without specifying its grounds. The trial court nonetheless understood the objection, implied in the discussion, to be based on relevance and Evidence Code section 352 grounds and ruled on those objections. Because the trial court considered the objections raised in this appeal, the purpose of requiring objection in the court below was satisfied, despite appellant's failure to succinctly specify grounds. Though the trial court did not discuss a fundamental fairness objection, its discussion of the Evidence Code section 352 claim preserved the due process claim. (*People v. Partida* (2005) 37 Cal.4th 428, 437.)

D. Admissibility of adult pornography

Even if appellant had not forfeited his contention that the trial court erred in admitting evidence that he possessed adult pornographic videotapes, we would also conclude that its admission, whether proper or not, was harmless in that it is not reasonably probable that had it not been admitted a result more favorable to appellant

would have ensued. (Evid. Code, § 353; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019.) Because of the widespread use of adult pornography, it is doubtful that the jury would have viewed such conduct as egregious or correlated with the pedophilia with which appellant was charged. The evidence of the adult pornography was brief and even less inflammatory than the evidence of appellant's possession of child pornography.

E. Admissibility of evidence of child pornography

Evidence was introduced by several witnesses that appellant possessed one or more child pornographic videotapes. Possession of child pornography is criminal. (§ 311.11.) "Any evidence of a defendant's criminal conduct, on other occasions, no matter how relevant to issues legitimately before the court, will have an inevitable tendency to suggest that the defendant has a general criminal propensity or disposition, and thus an inevitable tendency to persuade a trier that the defendant is somewhat more likely to have committed the crime currently charged." (*People v. Scott* (1980) 113 Cal.App.3d 190, 198.) Admission of evidence of other misconduct produces an "overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts." (1A Wigmore, Evidence (Tillers rev. 1983) § 58.2, p. 1215.) Consequently, other crimes evidence, as a general proposition, is inadmissible to prove a defendant's disposition. (Evid. Code, § 1101, subd. (a).)[8] This general rule is designed to insure that a defendant is convicted for what the defendant has done, not for who the defendant is.

Nonetheless, Evidence Code section 1101, subdivision (b),[9] carves out an exception to this rule. It provides that such evidence is admissible if it is relevant to an

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8 Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

9 Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent,

issue other than disposition to commit the act. Admissibility of other misconduct evidence depends upon (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crime to prove those facts, and (3) any policy requiring exclusion, such as Evidence Code section 352.[10] (*People v. Carpenter* (1997) 15 Cal.4th 312, 378–379; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404 ["[T]o be admissible such evidence [of other misconduct] 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352'"].)

We review the trial court's relevance and Evidence Code sections 352 and 1101 rulings under the abuse of discretion standard. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101]; *People v. Carter* (2005) 36 Cal.4th 1114, 1147; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 [Evid. Code, § 352]; *People v. Brown* (2003) 31 Cal.4th 518, 577 [relevance].) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "'[I]n most instances the appellate courts will uphold [the trial court's] exercise [of discretion] whether the [evidence] is admitted or excluded.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.)

Appellant's possession of child pornography was material to the issues in this matter. A "plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) In order to convict appellant of violating section 288, subdivision (a), the prosecution must prove that he touched his children intending sexual

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preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

10 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

gratification for himself or his children. (§ 288, subd. (a).) Hence, appellant's not guilty plea placed his intent in issue.

Appellant's possession of child pornography was probative. "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "In ascertaining whether evidence of other crimes has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves '"logically, naturally, and by reasonable inference"' to establish that fact. [Citations.] The court 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense . . . .'" (*People v. Thompson* (1980) 27 Cal.3d 303, 316, fn. omitted, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

Evidence Code section 1101, subdivision (b) permits prior misconduct evidence on the issue of intent. "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) "The least degree of similarity between the crimes is needed to prove intent. [Citation.]" (*People v. Steele*, *supra*, 27 Cal.4th at p. 1244.) If prior offenses share common features with the charged offense, they can be admitted to show motive. (*People v. McDermott* (2002) 28 Cal.4th 946, 999.)

Though there are obvious differences between watching a video of young female children and molesting toddlers, including a little boy, absolute similarity has never been required. In this case, there is an overriding similarity; both the possession of child pornography and molesting toddlers reflect an inappropriate and deviant sexual interest in children. Testament to the correlation between sex offenses against children and interest in child pornography are the numerous cases in which persons charged and/or convicted of lewd conduct with children were also charged and/or convicted of possession of child pornography. (See, i.e., *People v. Anderson* (2009) 47 Cal.4th 92, 99; *People v. Fields*

(2009) 175 Cal.App.4th 1001, 1005; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1111; *People v. Nicholls* (2008) 159 Cal.App.4th 703, 704; *People v. Hertzig* (2007) 156 Cal.App.4th 398, 400; *People v. Woodward* (2004) 116 Cal.App.4th 821, 825; *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1126; *People v. Johns* (1997) 56 Cal.App.4th 550, 552.) This correlation might be explained because "'"the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness."'" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 367.) "'"'[S]ex offenders are not "specialists," and [may] commit a variety of offenses which differ in specific character.'"'" (*Id*. at p. 368.)

Although the evidence of appellant's other crimes is probative on the issue of intent, such evidence "'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'" (*People v. Balcom* (1994) 7 Cal.4th 414, 426.) "'The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . . [Citation.]'" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) In considering whether the probative value of uncharged crimes is outweighed by the prejudice, we must evaluate its relevance, its similarity to the charged offenses, the inflammatory nature of that evidence, the degree of certainty of its commission, the probability of confusion, consumption of time, remoteness as well as other unique factors presented. (*People v. Harris* (1998) 60 Cal.App.4th 727, 738–740; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

We cannot say that the trial court abused its discretion in finding that the probative value of appellant's possession of child pornography outweighed its prejudice. That evidence had significant relevance to the issue of intent. When compared with the unthinkable offenses of which appellant was charged, the uncharged conduct was not significantly inflammatory. Moreover, any inflammatory capacity was mitigated because the videotapes were not admitted in evidence and did not depict infants or toddlers. The evidence of the child pornographic videotapes was extremely brief and not the focus of

the People's case, when viewed in the context of the entire trial. Further, the degree of certainty that appellant possessed such material is high, as he acknowledged possessing it in his Children's Court testimony and to Detective Gosser. While the record is unclear precisely when appellant possessed the child pornography, it was after his children were born and therefore was not too remote. Finally, because of the different nature of the charged crimes and the prior conduct, the jury was not likely confused. The evidence did not present an "'intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 49) and did not "exceed[] the bounds of reason." (*People v. Giminez, supra,* 14 Cal.3d at p. 72.)

Even if the trial court erroneously permitted admission of this evidence, any such error was harmless as it is not reasonably probable that a different verdict would have occurred but for the error. (See *People v. Welch* (1999) 20 Cal.4th 701, 749–750; *People v. Watson* (1956) 46 Cal.2d 818, 836–837; Evid. Code, § 353; *People v. Scheer, supra,* 68 Cal.App.4th at pp. 1018–1019.) Without the challenged evidence, there was still impressive evidence supporting the verdicts. A. and K. gave numerous statements before trial indicating appellant's sexual misconduct. Mar. testified to appellant's kissing his children in their genital area. Appellant admitted that when he was 10 years old, he kissed a baby cousin's genitals. He acknowledged inserting his finger in K.'s vagina, although describing it as occurring when he was cleaning her. He did not recall if he kissed his children's genitalia and held an unrepentant belief that there was nothing wrong in doing so. When Mar. told him to stop kissing their children's bodies, appellant testified that he was *unable* to completely do so, suggesting a deviant compulsion. Save for a few brief questions during a lengthy trial, the videotape evidence was not a focal point of the People's case, and the videotapes were not introduced in evidence.

III. Ineffective assistance of counsel

A. Failure to request limiting instruction

Defense counsel failed to request and submit a limiting instruction regarding the evidence that appellant possessed pornographic videotapes. Appellant contends that this failure amounted to ineffective assistance of counsel.

Respondent argues that there was a satisfactory explanation for the failure of counsel to request a limiting instruction. Appellant had opened the door to the issue by testifying that none of his home pornography videos depicted children.

The record fails to indicate why appellant's counsel did not request a limiting instruction, nor does it suggest that counsel was asked for an explanation and failed to provide one. (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 266.) It may well be that trial counsel did not want such an instruction, believing that it would call undue attention to the evidence of the pornographic material. (*People v. Hinton* (2006) 37 Cal.4th 839, 878 [failure to request limiting instruction on evidence of prior offense not ineffective assistance of counsel because counsel may have deemed it unwise to call further attention to it]; see also *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1319; *People v. Hawkins* (1995) 10 Cal.4th 920, 942 ["[a] reasonable defense counsel may have concluded that the risks of issuing a limiting instruction . . . was not worth the questionable benefits"], disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101.) Because the record is silent on counsel's reasoning and a satisfactory explanation exists for not making the request, we must indulge in the presumption that defense counsel's performance fell within the wide range of professional competence and can be explained as a matter of sound trial strategy. (*In re Andrews, supra,* 28 Cal.4th at p. 1253; *People v. Mendoza Tello, supra,* at p. 266.)

B. Failure to raise meritorious hearsay and confrontation clause objections

1. Background

Anticipating that the prosecution would not call K. to testify, defense counsel filed a motion in limine, seeking, among other things, to exclude the children's hearsay statements to Dr. Talamo, Elvik and investigators, and the children's statements contained in the medical reports. The motion did not assert a confrontation clause objection.

At the hearing on the motion, the prosecutor said that she did not intend to call K. as a witness because she was "still maintaining she does not remember anything." The prosecutor nonetheless intended to continue to pursue the charge related to K. because,

"[A.] will still remember seeing what was done to his sister." The remainder of the hearing focused on A.'s competence to testify. The trial court ruled that A. could testify, but did not specifically rule on the hearsay objection to K.'s out-of-court statements. Defense counsel did not press for a ruling on that objection. When the issue of the sexual assault examinations conducted by Dr. Talamo and Elvik arose during the discussion, defense counsel stated, "we're offering the [medical records] as business records," without redactions, though those records contained K.'s hearsay statements.

K. did not testify at trial or at any other judicial proceedings, but her statements were introduced through the testimony of three witnesses. Elvik testified at trial, without objection, that K. told her, as K. pointed to the area around her vagina and anus, that appellant had placed his thumb in her "bookie" or "pooka." The forensic sexual assault examination form Elvik completed was admitted in evidence without objection. Dr. Talamo later testified that K. told him that appellant had touched her vagina with his finger, and she saw him touch A. Defense counsel objected to this testimony on the "same objection that we raised prior to the trial." The trial court overruled this objection, and defense counsel cross-examined Dr. Talamo as to K.'s statements. The prosecutor introduced the doctor's completed forensic sexual assault examination form, which was admitted in evidence without objection. Detective Gosser testified without objection that K. demonstrated for the detective how appellant touched her vagina with her thumb.

2. Contentions

Appellant contends that he suffered ineffective assistance of counsel by virtue of his attorney's failure to raise meritorious hearsay and confrontation clause objections to K.'s extrajudicial statements.

Respondent argues that defense counsel did object on hearsay grounds, and therefore there was no ineffective assistance of counsel based on the failure to object.

3. Ineffective assistance of counsel

Assuming without deciding that appellant's counsel failed to object to K.'s out-of-court statements on hearsay and confrontation clause grounds, and that those statements were inadmissible on those grounds, we nonetheless conclude that appellant did not

suffer ineffective assistance of counsel. "'[A] defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez, supra,* 33 Cal.4th at pp. 1052–1053.) We cannot reach that conclusion here.

Apart from K.'s out-of-court statements, there was substantial evidence of appellant's offenses. Mar. testified that appellant kissed and smelled K.'s stomach, thighs, buttocks and genital area. Appellant admitted that he saw nothing wrong in kissing his children's genitals. A. told his teacher and Detective Gosser, in each of two interviews, that appellant inserted his finger in K.'s "cucu." This was strong evidence of appellant's conduct. K.'s out-of-court statements were merely cumulative. (See *Harrington v. California* (1969) 395 U.S. 250, 254 [error harmless where properly admitted evidence against the defendant is overwhelming and improperly admitted evidence is merely cumulative].) Moreover, A. was older than K. when he made these statements, likely giving him greater credibility. It is questionable how much credence the jury placed in the statements of a three year old who did not testify, especially when Dr. Hernandez was unable to ascertain if K. could tell the difference between the truth and a lie.

Most significantly, appellant admitted regularly inserting his finger in K.'s vagina, though trying to put an innocent spin on it by claiming that it occurred while he was cleaning her. As appellant and respondent agree, "the only real dispute at trial was whether [defendant's] actions were motivated by the prerequisite sexual intent." K.'s out-of-court statements were relevant only to the undisputed issue of what appellant did, not to the disputed issue of his intent in doing so.

V. The trial court's error in failing to exclude K.'s extrajudicial statements

Appellant contends that to the extent that defense counsel's motion in limine and trial objections preserved the asserted errors under the hearsay rule and confrontation clause with respect to K.'s extrajudicial statements introduced at trial, the trial court should have sustained the objections.

For the reasons set forth in part IV, whether or not the trial court erred in admitting K.'s out-of-court statements, that error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

VI. Failure to appoint separate counsel

A. Background

Before the sentencing hearing, appellant sent a letter to the trial court stating, among other things, "I also have some serious concerns about the performance of my trial counsel prior to and during trial on a variety of issues. As such I would like to relieve trial counsel and have appointed a level 4 or better appellate attorney to, . . . review the trial [court] record for indicia of ineffective assistance of trial counsel or other issues which may be cognizable on direct appeal, to bring to light potential issues cognizable on habeas corpus, to explore claims which may result in a meritorious motion to set aside the verdict or motion for retrial or other potential legal claims, and to place each into the trial record to preserve these issues for appeal and to protect my substantial rights."[11]

At the sentencing hearing, defense counsel made an oral new trial motion based on the trial court's pretrial and trial rulings without mentioning ineffective assistance of counsel. The trial court denied the motion. Counsel then argued appellant's sentence, the prosecution seeking the upper term and defense counsel urging what amounted to a time-served sentence.

Appellant then addressed the trial court. He argued that he was innocent and pointed to the inadequacies in the presentation of his trial, including that (1) Dr. Hirsch's report was not admitted in evidence, (2) Dr. Hirsch was not allowed to testify to his opinions, (3) an expert should have been called to discuss A.'s Phimosis and that masturbation in male children A.'s age is normal, (4) an expert should have been called on the question of suggestibility of children A.'s age, (5) there was little evidence of the

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[11] Appellant had made nine previous motions under *People v. Marsden* (1970) 2 Cal.3d 118 and had at least two prior attorneys appointed.

biases of the witnesses against him, including evidence that Mar. did not call the DCFS or police when she claimed appellant was engaging in child abuse, (6) no evidence was introduced of Mar.'s boyfriend's role in getting appellant prosecuted, (7) the jury never heard that it was not illegal to touch a child's genitals during routine diaper change, (8) the jury never heard about the four police reports of Mar.'s physical and mental abuse of appellant and her articulated wish to have a new husband and another father for her children, (9) the jury did not hear that appellant's testimony at the Children's Court hearings was taken out of context, (10) there was no evidence of the reasons that the preschool teachers were angry at appellant, (11) the jury had no opportunity to see the defendant's investigator's reports, allegedly supporting appellant's claims of innocence, and (12) the trial abruptly ended without appellant's witnesses showing up. Appellant did not ask to substitute counsel at the hearing, but only said that "I would like to ask you to take all of these things into consideration that I have told you."

The trial court allowed appellant to state his complaints. It did not inquire further about them or ask defense counsel for his input. The trial court proceeded to sentence appellant.

B. Contention

Appellant contends that the trial court erred in failing to appoint separate counsel to determine whether there were grounds for filing a motion for new trial based on ineffective assistance of counsel. He argues that after appellant complained about his attorney's performance, his attorney had a conflict of interest. This contention lacks merit.

C. Right to new counsel

"A criminal defendant's appointed attorney should be the embodiment of the defendant's Sixth Amendment right to the effective assistance of counsel." (*People v. Vera* (2004) 122 Cal.App.4th 970, 978–979.) Consequently, """"[a] defendant is entitled to [substitute appointed counsel] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation

is likely to result [citations].’”’” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Welch, supra,* 20 Cal.4th at p. 728.) The same standard for determining whether to allow new counsel to be substituted applies both before and after conviction. (*People v. Smith* (1993) 6 Cal.4th 684, 693–694.)

The trial court is required to hold a hearing on a defendant’s request to discharge appointed counsel and permit the defendant to provide a careful and full exploration of the reasons for wanting to change counsel. (*People v. Hill* (1983) 148 Cal.App.3d 744, 753; see *People v. Diaz* (1992) 3 Cal.4th 495, 575 [when defendant asks trial court to appoint new counsel after trial to prepare and present motion for new trial based upon ineffective assistance of counsel, the trial court must conduct a hearing].) “‘‘‘‘‘‘‘[T]he trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance.’”’” [Citations.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 95.) It must fully elicit and consider the reasons asserted by the defendant for the request for new counsel and make such inquiry of the defendant and defendant’s counsel as the circumstances appear to require. (*People v. Stewart* (1985) 171 Cal.App.3d 388, 396–397, disapproved on another ground in *People v. Smith, supra,* 6 Cal.4th at p. 693.)

“Once the defendant is afforded an opportunity to state the reasons for discharging an appointed attorney, the decision to allow a substitution of attorney is within the discretion of the trial judge unless defendant has made a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.” (*People v. Crandell* (1988) 46 Cal.3d 833, 859, disapproved on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.) “If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant.” (*People v. Diaz, supra,* 3 Cal.4th at p. 574.) “‘‘‘Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would ‘substantially impair’ the defendant’s right to assistance of counsel.” [Citations.]’

[Citation.]" (*People v. Valdez, supra,* 32 Cal.4th at p. 95; *People v. Smith, supra*, 6 Cal.4th at p. 696.)

Though appellant requested new counsel in his letter forwarded to the trial court before the sentencing hearing, he did not make an unequivocal request for new counsel at that hearing. "In any event, the record does not show defendant made a *Marsden* motion for discharge of his attorney. Mere grumbling about his counsel's failure . . . is insufficient. Although the defendant need not file 'a proper and formal legal motion' he must express 'at least some clear indication . . . that he wants a substitution of attorney.'" (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.) In fact, at the hearing, appellant appears to have pointed out the deficiencies in his representation for the court to consider in sentencing, as he asserted his complaints immediately following the attorneys arguments regarding proper sentencing and stated at the conclusion of his argument, "I would like to ask you to take all of these things into consideration that I have told you."

Even if appellant's argument at sentencing is construed as an unequivocal request to substitute new counsel, we conclude that the trial court did not abuse its discretion in denying that request. The hearing was adequate and the basis of appellant's claims of ineffective assistance of counsel justified the trial court's denial of the new trial motion without giving him new counsel. (*People v. Diaz*, *supra*, 3 Cal.4th at p. 574.) The trial court allowed appellant substantial time without interruption to fully state his complaints regarding his representation. While the trial court did not inquire of either appellant or his counsel regarding any of appellant's complaints, it presided over the trial and was in a perfect position to assess whether the complaints would have significantly impacted the verdicts. Many of appellant's claims that evidence was not presented involved inadmissible evidence. Some of appellant's claims that evidence was not introduced simply ignored that there was evidence on those points. The remaining claims pertained to the absence of evidence of bias by A.'s teachers and Mar.'s boyfriend, or complained that his attorney did not introduce evidence to refute every point made by the prosecution. Having heard all of the evidence, the trial court could readily assess the

merits of these contentions and, if it found them to be correct, their impact, if any, on the verdicts. The trial court's ruling was not an abuse of discretion.

VII. Cumulative error

Appellant contends that even if the asserted errors were not individually sufficiently prejudicial to warrant reversal, the cumulative effect of the errors denied him his federal and state constitutional right to a fair trial guaranteed by Article I, sections 7 and 15 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. This contention is meritless.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid*.) Because we have found no error, there are no errors to cumulate.

VIII. Sentencing Issues

A. Ex post facto and due process violations

The crimes of which appellant was convicted in this matter occurred between June 1, 2004 and May 31, 2005. At that time, section 1170, subdivision (b), entitled him to a presumptive middle term of imprisonment.[12] Appellant was convicted on November 3, 2008 and sentenced on December 2, 2008, more than a year after the United States Supreme Court declared the California Determinate Sentencing Law (DSL) unconstitutional in *Cunningham* and a year after the California Supreme Court decided *Sandoval*. *Sandoval* created a new sentencing scheme as part of a judicial remedy to cure the *Cunningham* error in the DSL. This remedy was consistent with Senate Bill No. 40

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[12] Section 1170, subdivision (b), in effect at the time of appellant's offenses, stated in part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation of the crime. . . ."

(SB 40), the new urgency legislation signed by the Governor as an emergency measure effective March 30, 2007.

In sentencing appellant, the trial court imposed the upper term of eight years on count 1 and a consecutive one-third the midterm, or two years, on count 2. In sentencing him to the upper term, the trial court stated, "I am not adopting the People's reasons because I think many of those are already within the nature of the offense by definition. But for a completely separate reason and that is because the offense occurred on multiple occasions." The trial court did not specify whether it was sentencing under section 1170, subdivision (b), as amended by SB 40 or the *Sandoval* judicial remedy.

Appellant contends that sentencing him under SB 40 or the judicially created remedy in *Sandoval* violated the ex post facto and due process clauses of the United States Constitution, respectively. We reject these contentions.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held that a defendant has a constitutional right to have the jury, not the trial judge, decide all facts that increase the penalty for a crime beyond the prescribed statutory maximum, except for prior convictions. (See also *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Cunningham, supra,* 549 U.S. at p. 288.) In *Cunningham,* the high court concluded that because California's DSL "authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Cunningham, supra,* at p. 293, fn. omitted.) The court concluded that the middle term in California's DSL was the relevant statutory maximum for the purpose of applying *Apprendi* and its progeny.

In response to *Cunningham*, the California Legislature passed SB 40, which amended section 1170 so as to eliminate the presumptive middle term in the triad of sentencing options available. Instead, section 1170 now provides that the trial court has discretion to select the upper, middle or lower term.[13]

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[13] Section 1170, subdivision (b), as amended, now provides: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice

On July 19, 2007, the California Supreme Court rendered its decision in *Sandoval.* The Supreme Court stated that it was "arguable that the amendments to the DSL should be viewed as [changes in procedural law] and that they are, therefore, applicable to any sentencing proceedings conducted after the effective date of those amendments." (*Sandoval, supra,* 41 Cal.4th at p. 845.) But it declined to decide that question, instead invoking its discretionary power to modify California's procedural sentencing laws to conform to the procedures implemented by the Legislature in SB 40. (*Sandoval, supra,* at pp. 845–846.) In so doing, the Court concluded that application of the procedural terms of its judicially crafted resentencing procedures, which were precisely the same as SB 40's amendment to the DSL, to crimes committed before its passage did not violate either the proscription against ex post facto laws or a defendant's right to due process. (*Sandoval, supra,* at pp. 855–857.) The Supreme Court "conclude[d] that the federal Constitution does not prohibit the application of the revised sentencing process . . . to defendants whose crimes were committed prior to the date of our decision in the present case." (*Id.* at p. 857.)

We must conclude that the judicial remedy fashioned in *Sandoval* violates neither the ex post facto nor due process clauses of the federal Constitution. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we need not reach appellant's contentions that those clauses are violated by SB 40. For even if we concluded that the trial court sentenced appellant under SB 40 in violation of those constitutional provisions, and remanded for resentencing, the trial court would be authorized to impose the upper term based upon the revised sentencing scheme formulated in *Sandoval.* Nothing in the record suggests that a resentencing proceeding would result in a different sentence. We will not reverse for further proceedings when to

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of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected. . . ."

do so would be "a useless and futile act and would be of no benefit to appellant." (*People v. Seldomridge* (1984) 154 Cal.App.3d 362, 365.)

B. Abuse of discretion in imposing upper term

The trial court stated that it was imposing the upper term on count 1 because the offense occurred on multiple occasions. Appellant contends that to the extent the trial court had discretion to impose the upper term without a jury finding of an aggravating circumstance beyond a reasonable doubt, it abused that discretion by imposing an upper term based on an aggravating factor that was unsupported by the record. He argues that the sole factor on which the trial court relied in imposing the upper term was that the offense occurred on multiple occasions, though the record does not indicate that appellant improperly touched A. more than one time. This contention is without merit.[14]

There was sufficient evidence to support the trial court's finding that appellant committed the charged offense against A. on multiple occasions. There is no requirement that the aggravating factor must have occurred during the time period alleged in the information, as appellant argues. A. told Detective Gosser that appellant inserted his finger in his anus and touched his penis numerous times. A. told his preschool teacher that appellant "*touches* [K.'s] private parts," suggesting repeated conduct. Appellant said that he might have inserted his finger in K.'s vagina while he was cleaning her as much as once a week. This evidence was sufficient to support the inference that appellant committed the charged acts on multiple occasions. Moreover, the jury found beyond a

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[14] Appellant here failed to object to the trial court's exercise of discretion in imposing the upper term based upon the commission of the charged acts on multiple occasions, thereby forfeiting this claim on appeal. The forfeiture doctrine applies to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*People v. Scott* (1994) 9 Cal.4th 331, 353.) But because neither party raised the forfeiture issue, we do not base our decision on it.

reasonable doubt that appellant committed multiple acts of the lewd conduct by convicting him of one count against each of his children. The two convictions, which are supported by the evidence, supplied an adequate factual basis to justify the trial court's finding and imposition of the upper term.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ